No. 14667

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH WHITEHEAD,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of the Estate of NED WHITEHEAD, doing business as NED WHITEHEAD & Co., Bankrupt,

Appellee.

APPELLEE'S BRIEF.

QUITTNER & STUTMAN,
By GEORGE M. TREISTER,
639 South Spring Street,
Los Angeles 14, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEE'S BRIEF.

Jurisdiction.

The Court has jurisdiction of this appeal under Section 24 of the Bankruptcy Act (11 U. S. C. Sec. 47).

Statement of the Case.

On October 8, 1953, appellant, a creditor of the bankrupt, obtained an *ex parte* order from the Referee authorizing her to levy execution and/or garnishment upon any assets of the bankrupt in the possession of Appellee Trustee in Bankruptcy [Tr. pp. 5-6].* Subsequently,

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*All citations to the record refer to the printed Transcript of Record on file in the Court of Appeals.

appellee petitioned to have the order of October 8, 1953 vacated and the execution declared void, upon the grounds that the levy was impeding the administration of the estate and that the order had been entered contrary to law. [Tr. pp. 22-24.] After hearing, the Referee sustained appellee's position and by order of August 16, 1954, granted the Trustee's petition. [Tr. pp. 22-28.]

On review, the District Judge affirmed the holding of the Referee. [Tr. pp. 39-40.] This appeal followed. [Tr. p. 40.]

Issues Presented.

1. May a Court of Bankruptcy authorize a creditor armed with a state court writ of execution or other process to levy upon assets in the possession of a Trustee in Bankruptcy?

2. Assuming that the Bankruptcy Court is empowered to authorize such a levy, was it an abuse of discretion in the present case to vacate the order permitting the levy?

ARGUMENT.

I.

The Bankruptcy Court Had No Power to Allow Appellant to Levy on Assets in the Possession of Appellee Trustee.

It has long been the established rule in this Circuit that a bankruptcy court cannot permit a levy under state court process upon property in the possession of the trustee.

> *In re Argonaut Shoe Co.*, 187 Fed. 784, 26 Am. B. R. 584 (C. A. 9, 1911).

The *Argonaut* case involved an attempt by a creditor of a claimant who was entitled to a bankruptcy dividend to levy upon that dividend after declaration but before the trustee had paid it. The creditor argued that California law permitted garnishment of funds in the possession of an officer of the state court under similar circumstances. This court rejected that analogy:

> "The respondents rely upon the rule established by the state courts of California that, where an order is made by a court directing payment of funds to claimants, the court immediately loses jurisdiction of the particular funds, and the person to whom the money is due has the right, upon failure of the trustee or officer of the court to pay the money, to enforce collection thereof; the fund, by operation of law, immediately vesting in the parties who become legally entitled thereto; citing Dunsmoor v. Furstenfeldt, 88 Cal. 522, 26 Pac. 518, 12 L. R. A. 508, Estate of Nerac, 35 Cal. 397, 95 Am. Dec. 111, and decisions of other state courts. But the rule of a state court permitting the garnishment of

> dividends after they have been declared by an officer of a state court, such as a receiver, administrator, or a trustee, cannot affect the administration by a federal court of an estate in bankruptcy. Clark v. Shaw, (C. C.), 28 Fed. 356, and cases there cited. The right to garnishee funds in *custodia legis* must depend upon express statutory authority. No such authority is to be found in the bankruptcy law. The distribution of the assets of the bankrupt therefore cannot be stayed or prevented by the process of a state court, the object of which is to withhold a dividend from a creditor entitled thereto for the security of a plaintiff pending litigation."

To the same effect is the holding of the Court of Appeals for the Seventh Circuit in *Matter of Electric Telephone Co.,* 211 Fed. 88, 31 Am. B. R. 612 (C. A. 7, 1914).

If the Bankruptcy Court lacks power to permit a levy upon dividends that have already been declared, *a fortiori* it cannot permit a levy which, as in the present case, seeks to reach a bankrupt's mere potential interest in the general assets of the estate.

Bankers' Mortg. Co. of Topeka, Kan. v. McComb, 60 F. 2d 218 (C. A. 10, 1932), relied upon by appellant, was not a bankruptcy case. There, the question considered was whether levy was permissible upon securities deposited with the United States Commissioner as bail in a criminal matter. No problem of interference with the administration of an estate of any kind was involved. Most important, appellant's attempt to extend the language of the *McComb* opinion to the present bankruptcy context is plainly inconsistent with this court's holding in the *Argonaut* case, *supra.*

II.

Assuming That the Bankruptcy Court Had Discretion to Permit Appellant's Levy, It Wisely Exercised That Discretion by Denying Permission.

The only asset which appellant's levy might reach is certain shares of Whitehead & Co., a corporation controlled by the bankrupt and which does business in Puerto Rico. There is, of course, no general market for the sale of the stock of this closely-held corporation. The only substantial purchase offer has been made by the bankrupt himself and, accordingly, appellee trustee has long been attempting to dispose of the estate's interest in the stock to this prospective purchaser. [See Petition to Compromise, Tr. pp. 19-22.]

Obviously, however, the bankrupt refuses to pay the purchase price to appellee so long as appellant threatens to seize the shares under execution the moment the transaction is consummated. For this reason, appellant's attempted levy has very seriously interfered with the orderly liquidation of the bankruptcy estate and has made it impossible for appellee to complete his administration. Therefore, the Referee after hearing the facts of the case decided not to permit further interference with the administration and properly vacated the order of October 8, 1953, which had been entered *ex parte*. If any discretion existed, such a decision certainly was a wise exercise of it.

Conclusion.

For the foregoing reasons, the Order of the District Judge, affirming the Referee's order of August 16, 1954, should be affirmed.

Respectfully submitted,

QUITTNER & STUTMAN,

By GEORGE M. TREISTER,

Attorneys for Appellee.